United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1052

To be argued by
HAROLD DUBLIRER

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

VINCENT DiNAPOLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT DiNAPOLI'S BRIEF

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Statement

Appellant DiNapoli appeals from a judgment of conviction entered on January 14, 1977 in the United States District Court, Eastern District of New York, after a trial before Hon. Mark A. Costantino, U.S.D.J. and a jury (393a-394a).*

The indictment was filed on October 7, 1975. It charged that between October 12, 1970 and October 17, 1970, ap-

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* The reference is to the pages of the Joint Appendix.

pellant DiNapoli, defendants Edward Feder, James Santamaria, Jimmy Davis, Donald Laucirica, Clint Fromal and Richard Surrency, and unindicted co-conspirator, Salvatore Montello,* conspired to influence by bribery the outcome of horse races at Pocono Downs, Pennsylvania, in violation of 18 USC §224 (4a-5a).

The indictment was ordered sealed on October 7, 1975; it was unsealed February 5, 1976. On February 6, 1976, appellant DiNapoli pleaded not guilty (2a).

On March 5, 1976, appellant made a motion, among other things, to dismiss the indictment because he had been denied a speedy trial or for a hearing to inquire into the circumstances surrounding the delay in indictment and trial (6a-10a). The motion was denied (20a-23a).

The government filed its notice of readiness for trial on May 4, 1976 (16a). DiNapoli and Feder were tried on October 5, 6, 7, 12, 13 and 14, 1976.** On October 13, 1976, the jury returned a guilty verdict againt appellant DiNapoli. On October 14, 1976, the jury acquitted defendant Feder.

On December 21, 1976, appellant moved for judgment of acquittal under F.R.Cr.P. 29(c) or, in the alternative, for a new trial in the interest of justice under F.R.Cr.P. 33 (24a-36a). The Court denied the motion in a written opinion dated January 13, 1977 (37a-41a).

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* Salvatore Montello is also referred to in the record as Montella. His brother, Vincent, testified as Vincent Montella and referred to Salvatore as Montella. Salvatore's wife, Helene, testified as Helene Montella and she too referred to Salvatore as Montella. To avoid confusion we shall spell all their names "Montello" throughout this brief.

** The government dismissed the indictment against defendants Fromal, Laucirica, Santamaria and Surrency. Defendant Davis pleaded guilty.

On January 14, 1977, appellant was sentenced to imprisonment for a term of three years to serve three months of weekends from Friday at 8:00 P.M. to Sunday at 8:00 P.M., balance of sentence on probation, and to pay a fine of $1000.00 (393a-394a).

Appellant is at liberty on bail pending this appeal. The fine has been paid.

Facts

The crime involved here, allegedly committed in 1970, was brought to the attention of the authorities in 1975 by Salvatore Montello (51a). Montello had spent his life in crime (58a-63a, 125a-128a). In 1975, while serving a 7½ year sentence for burglary at Lewisburg Prison, he escaped (62a-63a). When finally recaptured, he started to "cooperate" with the authorities (63a-64a). The result was the case at bar.

The government's case was based on Montello's testimony. He was an unindicted co-conspirator. His testimony was critical to the government's case against appellant. The prosecutor conceded that this case involved the testimony of "an accuser, Salvatore Montello, against the accused, Mr. DiNapoli" (305a).

The trial judge's preliminary remarks to the jury discussed the motives of witnesses (46a).

The government's opening statement discussed Montello's motive for testifying (51a-53a). During the government's case it questioned Montello as to his motive for testifying. He answered, "They tried to kill me" in the Federal House of Detention on West Street (64a) and that he "agreed to cooperate with the government" "[o]n account of what happened to me in West Street" (64a-

65a).* That agreement entailed "[i]mmunity for my cooperation" (68a).**

Thus the issue of Montello's motive for bearing witness against DiNapoli was initially and affirmatively posed by the government.

On appellant's case, the defense called Helene Montello, the accuser's wife, as a witness (338a), and sought to examine her concerning visits to her husband while he was confined at Lewisburg (340a). The court upheld the government's objection to this line of questioning as irrelevant (341a). Appellant then offered to prove by this witness and by Debby Scarpadi, Mrs. Montello's daughter (339a), that Montello, after having escaped from prison and well before any agreement with the government, told his wife in the presence of others that he would never go back to prison and, if necessary, would frame people to stay out of prison (342a, 358a) and that, while a fugitive from Lewisburg Prison, Montello called DiNapoli for help and was refused and then Montello said, "I will get that fat bastard" (347a, 353a).

The court excluded the proffered testimony on the ground that the matter had not been brought to Montello's attention during his cross-examination, saying, "Why didn't you ask him, you would frame people?" (344a *et seq.*).

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* On cross-examination Montello repeated that the only reason he decided to cooperate was "Because they tried to kill me" and "Because (I) now have become a good and truthful citizen (245a). The prosecutor's summation also argued that this alleged attempt on Montello's life was his motive for testifying (363a-364a).

** Montello testified on cross-examination, "I was cooperating before I even got immunity" (141a), although it appeared from the affidavit of Assistant United States Attorney Paul Corcoran that Montello had refused to testify absent a grant of immunity (144a).

Thereupon defense counsel said, "If that's the basis of your ruling we'd ask for a recall of this witness" (346a). A colloquy followed between court and counsel, the court adhering to its ruling, saying, "I couldn't reconcile myself to let it in. Maybe if he was asked the question on cross-examination, I might have considered it" (353a) and concluding, "No, I won't let it in. I will come to that conclusion" (354a).

At that point, defense counsel for the *second* time asked to recall Montello, saying, "I am asking for a recall of Mr. Montello. We'd like him reproduced (sic) in this courtroom. We don't know where to subpoena him.* If I have to I will subpoena him" (354a-355a).

The court observed, "He was here. You knew what you are telling me now" (355a). Defense counsel said, "I am asking for Mr. Montello's whereabouts" (355a).

After some further argument to the effect that the proffered testimony was hearsay, collateral or irrelevant, the court announced "I will stay with my position" (356a).

Then, for the *third* time, defense counsel asked for the recall of Montello, saying (357a):

> "Mr. Victor: We want Mr. Montello. I'd like his whereabouts so he can be subpoenaed. If you don't want him on the stand, fine, but I want (him) her(e) . . .
>
> Mr. Woodfield: Mr. Montello will be available to the defendants if they wish to—
>
> Mr. Victor: As a hostile witness . . .
>
> Mr. Victor: We'd like to interrupt the witness.
>
> The Court: This is no surprise . . . You knew it when he was on the witness stand. . . ."

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* Montello was kept hidden by the government under the Witness Protection Act, Public L. 91-452, Title V, §§501-504, Oct. 15, 1970, 84 Stat. 933.

Despite the government's consent to make Montello "available to the defendants", the court announced, "I have made my ruling" (358a). When defense counsel excepted, the court observed, "All right. You put up a good fight." Defense counsel answered, "But I lost."

Defense counsel understood the ruling to be, as seems evident, that the court excluded the extrinsic evidence of Montello's bias because Montello had not been previously confronted with the statements on cross-examination and that it was too late to remedy the situation.

In summation, the government took advantage of the fact that appellant had been prevented from informing the jury that Montello had said that he would frame people if necessary to stay out of jail and would "get that fat bastard". The United States Attorney argued to the jury, "There has not been shown nor does there exist motives for (Montello and Davis) to lie from that stand (363a).

After the jury's verdict finding appellant guilty, appellant moved for judgment of acquittal under F.R.Cr.P. 29(c) or, in the alternative, for a new trial in the interest of justice under F.R.Cr.P. 33. The ground for the application was that the trial court had erred (a) in refusing to allow appellant "to establish the hostility" of Montello, (b) in refusing to require the prosecution to furnish Montello's address so that appellant could subpoena him in order to lay the foundation required by the court, and (c) in refusing to recall Montello, even after the government offered to make Montello available to appellant, to supply that foundation (24a-36a).

The Court denied the motion in its entirety (37a-41a) on the ground that, since Mr. Montello had not been cross-examined on the aforesaid statements, a proper foundation had not been laid for Mrs. Montello's and Miss Scarpadi's testimony. It rejected appellant's contention that

a proper foundation had been laid when the government asked Montello on its direct case to explain his decision to cooperate with the government, thereby affirmatively placing his motive to testify in issue.

The court rejected appellant's contention that he was denied the right to recall Mr. Montello in order to lay the required foundation, holding that "the record does not support the defendant's claim that he was prevented by the court from calling Mr. Montello" (41a). The Court held that its repeated statement that it had made its ruling "was in no way a denial of the defendant's request to recall Mr. Montello" (40a).

As to why Montello was not recalled when the government finally consented to make him available as a witness, the Court observed (41a):

> "* * * The government agreed to produce Montello and there was thus nothing more for the court to do; yet no further request was made by the defendant to have Montello brought back to Court."

In so holding, the Court overlooked that, at that point, it had ruled, "This is no surprise . . . You knew it when he was on the witness stand" (357a) and had repeated "I have made my ruling" (358a), implying that appellant could not recall Montello despite the government's agreement because the occasion for recalling him was not a matter of surprise but something known to appellant when Montello was on the stand. The Court's statement that appellant made no further request to have Montello recalled overlooks that appellant had already made that request three times.

POINT I

The trial court prevented appellant from exposing to the jury the accuser's malignant motives. This was plain error, a denial of due process rights.

> "The exposure of a witness' motivation in testifying is so significant that in a crimina case curtailment of this right may amount to a denial of confrontation (*Davis* v. *Alaska,* 415 U.S. 308) or due process (*Giglio* v. *U.S.,* 405 U.S. 150) rights." 3 Weinstein's Evidence p. 607-18.

This is a case of accuser against accused. The government's case tendered the issue of the accuser's motive to testify. On appellant's case, the trial court prevented appellant from introducing extrinsic evidence of the accuser's hostility because, in the court's view, appellant had failed to lay a proper foundation by cross-examining the accuser during the government's case with respect to the extrinsic material.

Appellant thereupon requested Montello's whereabouts to subpoena him (the government had kept him hidden under the Witness Protection Act) and asked to have him recalled for further cross-examination to supply the foundation. Although the government was willing to make Montello available to defendants, the court refused to permit the recall of the accuser.

Taking advantage of this state of affairs, the prosecutor in summation reminded the jury that the accuser's lack of bias, urged in opening and on the government's case, stood uncontradicted.

The jury was never aware of appellant's contention that the accuser's motives were malign. Appellant was deprived of an opportunity to establish a reasonable doubt based on the accuser's malevolence.

The "bias of a witness is not a collateral issue and extrinsic evidence is admissible to prove that a witness has a motive to testify falsely." *United States* v. *Harvey*, 547 F.2d 720, 722 (2 Cir. 1976). "Special treatment is accorded evidence which is probative of a special motive to lie 'for if believed it colors every bit of testimony given by the witness whose motives are bared.'" *United States* v. *Harvey*, supra, at page 722, citing *United States* v. *Blackwood*, 456 F.2d 526, 530 (2 Cir. 1972).

Especially is this true where, as here, the witness involved is the government's principal witness. As the prosecutor said, this case involves "an accuser, Salvatore Montello, against the accused, Mr. DiNapoli" (305a).

Montello's "reliability and credibility may well have determined the guilt or innocence of appellant." *United States* v. *Harris*, 501 F.2d 1, 8 (9 Cir. 1974), where the court went on to say (501 F.2d at 9):

> ". . . It is essential, when the witness' credibility is critical to the Government's case, that defense counsel 'be given a maximum opportunity to test that credibility by exploring the witness' motivation for testifying'. *United States* v. *Rodriguez*, 439 F.2d 782, 783".

The testimony of Mrs. Montello and Miss Scarpadi would have impeached Mr. Montello's credibility by bringing before the jury evidence of his bias against appellant. The threat to frame people to stay out of jail and the expression, "I'll get that fat bastard", are convincing evidence of bias.

Mrs. Montello's testimony to this effect was not privileged. It was uttered in the presence of a third person. *Wolfle* v. *United States*, 291 US 7, 14 (1934); *Pereira* v. *United States*, 347 US 1, 6 (1954).

The trial court excluded the testimony of Mrs. Montello and Miss Scarpadi concerning Montello's hostility toward appellant on the ground that the statements were not first called to Montello's attention on cross-examination, saying (38a):

> ". . . As the Second Circuit stated in *Harvey,* 'Prior to the proffer of extrinsic evidence (of bias), a witness *must* be provided an opportunity to explain the circumstances suggesting bias.' Slip opinion at 6033 (emphasis added)." 547 F.2d at p. 722.

Appellant contends that Federal Rule of Evidence 613 (b) does not require that a witness be afforded an opportunity to explain or deny a prior inconsistent statement *before* extrinsic evidence may be admitted.* Statements in *United States* v. *Harvey, supra,* to the contrary are dicta, for the court there found that "While defense counsel could have been more expansive in establishing his foundation, we find that it was sufficiently established." 547 F.2d at p. 723.

Federal Rule of Evidence 613(b) does not in so many words require any condition precedent to the introduction of extrinsic evidence of a prior inconsistent statement. If a condition precedent may be said to lurk beneath the surface of the words used, the rule itself provides an alternative course in the clause, "or the interests of justice otherwise require."

The Advisory Committee's Note to Rule 613(b) points out that there is "no specification of any particular time

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* New York law does not require any such condition precedent for introduction of extrinsic evidence of prior statements of a witness to show bias or hostility. *Richardson on Evidence* (9th Ed, 1964) Sec. 517 pp 524-525.

or sequence" for "providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement." See also 10 Moore's Federal Practice p. vi-214.

Note *United States* v. *Barrett,* 539 F.2d 244 (1 Cir. 1976) and particularly the quotation from the commentary by the Reporter of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 539 Fed. 2d at p. 255.

In addition we urge that where the government in its direct case puts the motives of a prosecution witness in issue, not only by calling the witness but by having the witness testify to the purity of his motives, the defense on its case may meet that issue by extrinsic evidence of prior inconsistent statements of that witness' hostility. The prosecution may then recall the witness in rebuttal to deny or explain the extrinsic matter.

Finally, if it be a condition precedent for the introduction of extrinsic evidence of bias that the witness first be alerted to such evidence and if counsel overlook this requirement, is it not in the interest of justice while the trial is still in progress to recall the witness to supply the required foundation? Here defense counsel requested such relief three times. The third time, the government consented to make Montello available for the purpose of supplying the required foundation. The trial court nevertheless excluded the evidence.

As this court said in *United States* v. *Harvey,* 547 F2d 720 (1976) at p. 723:

> "Although Federal Rule of Evidence 403 vests trial courts with discretion to exclude evidence if its probative value is substantially outweighed by the danger of prejudice, confusion or delay, the trial court apparently did not exclude Mrs. Harvey's

> testimony on the basis of this consideration. There is no indication in the record that Mrs. Harvey's testimony posed a realistic possibility of confusion or prejudice, see *United States* v. *Aloi*, 511 F.2d 585, 602 (2d Cir. 1975), or would have caused a significant delay in the proceedings. *Indeed, given the importance of the bias testimony to the defense, whatever confusion or delay that may have resulted from its admission would have to have been overwhelming to satisfy Rule 403's balancing test.*" (emphasis ours)

In the same vein this Court said in *United States* v. *Blackwood*, 456 F2d 526 (2 Cir. 1972) at p. 530:

> ". . . We believe that the better practice would have been to allow Cohen to recall Coleman for the limited purpose of examining him with respect to his prior inconsistent statement, since it would have caused but a minor disruption of the trial and could conceivably have had some effect on the jury."

We respectfully submit that Judge Costantino's refusal to permit Montello to be recalled to supply the foundation for extrinsic evidence of his bias was an abuse of discretion. Montello concededly was available. There was no contention that judicial economy or convenience or prejudice to any party justified the court in ruling as it did. The statements involved are convincing evidence of bias.

The trial court's error in refusing to admit the testimony of Mrs. Montello and Miss Scarpadi was so prejudicial as to require a reversal of appellant's conviction.

> ". . . A defendant's major weapon when faced with the inculpatory testimony of an accusing witness often is to discredit such testimony by proof of bias

> or motive to falsify." *United States* v. *Blackwood*, *supra* 456 F.2d at 530.

Appellant was denied the use of that weapon. He was thus denied a fair trial. *Alford* v. *United States*, 282 U.S. 687, 692, 694 (1931). The error affected "substantial rights." F.R. Cr.P. 52(b); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

POINT II

The trial court effectively prevented appellant from testifying in his own defense by holding that a past misdemeanor conviction was admissible to attack his credibility.

Appellant did not testify in his own defense. He was effectively prevented from doing so by the trial court's ruling that appellant's past conviction of a violation of New York Penal Law Sec. 105.05, conspiracy in the third degree, a class A misdemeanor, was admissible to attack his credibility.

Appellant contends that this was error because the certificate of relief from disabilities issued to appellant under New York Correction Law Sec. 702 is within the class of exculpatory instruments described in Fed. R. Evi. 609(c).

Appellant was convicted of a violation of New York Penal Law Sec. 105.05 on February 15, 1972 (42a). This provides:

> "A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

> "Conspiracy in the third degree is a Class A misdemeanor."

Fed. R. Evi. 609(c) provides that evidence of a conviction "is not admissible under this rule if (1) the conviction has been the subject of a . . . certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted . . ."

A certificate of relief from disabilities resulting from the past conviction mentioned above was issued to appellant on March 20, 1973 under New York Correction Law Sec. 702 (42a).

New York Correction Law §702(1) provides that any New York court may, in its discretion, and under certain circumstances, issue a certificate of relief from disabilities to an "eligible offender" for a conviction that occurred in such court. Correction Law §702(2) provides:

> "Such certificate *shall not* be issued by the court unless the court is satisfied that:
>
> * * *
>
> (b) the relief to be granted by the certificate is consistent with the rehabilitation of the eligible offender; and
>
> (c) the relief to be granted by the certificate is consistent with the public interest." (emphasis ours)

Appellant contends that the certificate of relief from disabilities issued to him by the Supreme Court of the State of New York was within the class of exculpatory instruments, to wit, a "certificate of rehabilitation, *or other equivalent procedure*", described in Fed. R. Evi. 609(c).

Once a New York judge decides to exercise his discretion under Correction Law Sec. 702(1) he must make certain findings. This is mandated by the clause "Such cer-

tificate shall not be issued" etc. The following phrase, "unless the court is satisfied", is the equivalent of the phrase in Fed. R. Evi. 609(c), "based on a finding." The requirement in Fed. R. Evi. 609(c) for "other equivalent procedure based on a finding of the rehabilitation of the person convicted" is met by the finding under Correction Law Sec. 702(1) that "the relief to be granted by the certificate is consistent with the rehabilitation of the eligible offender."

We urge that the trial court's ruling—to the effect that the certificate of relief from disabilities here was not "a certificate of rehabilitation, or other equivalent procedure"—was unduly restrictive of the intention of Federal Rule of Evidence 609(c). Even before the adoption of this rule, there was growing realization that the cause of truth might be helped more by letting the jury hear a defendant's story than by the defendant foregoing that opportunity because of the fear of prejudice founded upon a prior conviction.

So, McCormick, Evidence §43 at 94 (1954):

> "On balance it seems that to permit . . . one accused of crime to tell his story without incurring the overwhelming prejudice likely to ensue from disclosing past convictions, is a more just, humane and expedient solution . . ."

This principle was first adopted in *Luck* v. *United States*, 348 F 2d 763 (D.C. Cir. 1965) and followed in this circuit. *United States* v. *Palumbo*, 401 F 2d 270, 273 (2 Cir. 1968), cert. den. 394 US 947. See also material collected in *United States* v. *Allison*, 414 F 2d 407 (1969), at footnote 8.

Fed. R. Evi. 609(c) expresses and furthers this trend. It favors letting the jury hear a defendant's story without incurring the prejudice likely to ensue from disclosing

past convictions. This objective is emphasized by Federal Rule of Evidence 102 that "[t]hese rules shall be construed . . . to the end that the truth may be ascertained and proceedings justly determined."

The trial court's negative ruling had far-reaching effect. it prevented appellant from testifying in his own defense; it also prevented appellant from calling character witnesses since, under Federal Rule of Evidence 608(b), the trial court in its discretion may have permitted the prosecution to question them as to appellant's past conviction as bearing on his reputation for truthfulness.

In sum, the trial court's ruling erred in its interpretation of Rule 609(c) to appellant's prejudice. It unfairly restricted appellant in presenting his defense. It deprived appellant of due process rights.

POINT III

The trial court erred in denying appellant's motion for a hearing to inquire into the circumstances of the delay in prosecution.

The indictment alleges that the crime charged occurred between October 12 and October 17, 1970, "both dates being approximate and inclusive" (4a).

The indictment was filed on October 7, 1975, five days before the expiration of the statute of limitations (4a). It was immediately ordered sealed and was not unsealed until February 5, 1976 (2a).

Appellant was arraigned on February 6, 1976 (2a). The government filed its notice of readiness for trial on May 4, 1976 (16a).

Thus, the indictment was filed only five days before the expiration of the applicable five-year statute of limita-

tions, 18 USC §3282. Some five years and four months elapsed between the date of the crime and the unsealing of the indictment plus an additional three months to readiness for trial.

The government stated, in answer to appellant's interrogatories (12a), that it first received information concerning the crime charge here on July 14, 1975, that it presented evidence to the Grand Jury on October 7, 1975, that the Grand Jury voted an indictment that same day, and that the reason the indictment was sealed on October 7, 1975 was that "The investigation into these defendants' involvement into other crimes was continuing, which resulted in indictments 76 Cr 46, 80, 81, 82, 83 and 76 Cr 218" (14a-15a).*

The indictment was unsealed on February 5, 1976 and appellant was arraigned on February 6, 1976. On February 23, 1976, appellant moved to dismiss the indictment because of the denial of a speedy trial or, in the alternative, for a hearing to inquire into the circumstances surrounding the delay (6a-7a, 9a-10a). The motion was denied in both aspects (21a-23a).

In *Nickens* v. *United States,* 323 F 2d 808 (D.C. Cir. 1963), cert. den. 379 US 905, Judge Skelly Wright observed (concurring opinion, 323 F 2d at 813):

> "Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused be-

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* Appellant was not indicted for any other crime.

> comes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags."

In *Dickey* v. *Florida,* 398 U.S. 30 (1970), Mr. Justice Brennan noted (concurring opinion, 398 US at 43):

> "Deliberate governmental delay in the hope of obtaining an advantage over the accused is not unknown."

The Supreme Court has held, *United States* v. *Marion,* 404 U.S. 307 (1971), that an indictment must be dismissed when either actual prejudice or intentional prosecutorial delay to obtain some tactical advantage is demonstrated. See also *United States* v. *Finkelstein,* 526 F 2d 517 (2 Cir. 1975); *United States* v. *Foddrell,* 523 F 2d 86 (2 Cir. 1975); *United States* v. *Frank,* 520 F 2d 1287 (2 Cir. 1975).

It is evident that "intentional prosecutorial delay" is rarely if ever demonstrable on the face of the indictment. Deliberate governmental delay in the hope of obtaining an advantage over the accused is not generally advertised in The New York Times.

The fact that evidence was presented to the grand jury and an indictment voted all on one day, October 7, 1975 and that only five days before expiration of the statute of limitations is, to say the least, unusual. The fact that the indictment was then sealed for another four months emphasizes the unusual circumstances presented here.

These facts called for some explanation. Appellant was not bound by the government's answer to interrogatories on the subject. He was entitled to inquire via the hearing requested, into the circumstances surrounding the delay. The trial court denied the hearing without explanation (23a). This, we suggest, was error.

POINT IV

The prosecutor committed prejudicial misconduct.

The prosecutor was guilty of misconduct on several occasions.

The court erred in denying a motion for mistrial because of the prosecutor's misconduct in causing Montello, the accuser, to testify that someone had tried to kill him while he was held in the West Street jail (63a-66a). This was a deliberate impropriety; the same thing had occurred at an earlier trial involving other defendants where "[t]here was an admonition by the Court" (65a).

The court stated, "At the very least, we need a mistrial. I'll deny it at this point, but I will straighten it out" (66a). It was never "straightened out." The impropriety was repeated and aggravated by the prosecutor's argument in summation that "There came a time when (Montello) indicated his life was in danger and had to make a very important decision in his life" (363a-364a).

This matter was obviously irrelevant since there was no contention, much less evidence, assuming that such an event had really occurred, that appellant had anything to do with it. Worse than irrelevant, it introduced a sinister note intended to reflect on appellant.

The court erred also in denying a mistrial because of the prosecutor's blatant appeal to anti-Italian prejudice in the cross-examination of Vincent Montello, a defense witness, with the question whether Vincent vehemently disliked his brother, Salvatore, "because he broke the honor code among the Italians and he is co-operating with the Government" (325a). This ethnic slur and the reference to an alleged attempt on Montello's life was intended to give the impression that someone had tried to kill Montello for denouncing DiNapoli.

Finally, the jury was never made aware of appellant's contention that Montello was motivated by bias and hostility when he accused appellant of crime because defense counsel was precluded from proving it. The prosecutor's summation nevertheless referred to defense couns l's failure to prove that which he set forth to prove concerning Montello's motive for accusing appellant (see 362a-364a, 370a, 390a). In the context of this case, this was a reference to extrinsic matters not in evidence and could only result in prejudice to appellant. It constituted plain error.

Particularly reprehensible in this connection was the prosecutor's argument in summation that appellant had sought to mislead the jury by calling Mrs. Montello as a witness "so you could decide whether or not she is a pig" (389a). Montello had testified that his wife was a pig (137).

This was unfair comment. The prosecutor, of course, knew that the reason that the defense had called Mrs. Montello as a witness was to adduce evidence that Montello had said that he would frame people, if necessary, to stay out of jail, and had threatened to "get that fat bastard".

In *Berger* v. *United States,* 295 US 78 (1935), the court said at p. 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape

> or innocence suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

CONCLUSION

The sum of what has been said is that appellant did not have a fair trial. He was deprived of due process rights. He was prevented from bringing to the jury's attention that his accuser had threatened to frame people to stay out of jail and to "get that fat bastard", meaning appellant. With that evidence excluded, the prosecutor argued to the jury that the accuser bore no malice toward appellant.

Appellant was effectively prevented from testifying in his own defense and even from calling character witnesses by the trial court's refusal to accept the New York State certificate of relief from disabilities as a "certificate of rehabilitation, or other equivalent procedure."

Finally, the court permitted the prosecutor to introduce the sinister note that the accuser Montello "broke the honor code among the Italians" and therefore someone had tried to kill him while he was in the West Street jail for denouncing DiNapoli.

The judgment of conviction should be reversed.

Dated: New York, New York
March 29, 1977

Respectfully submitted,

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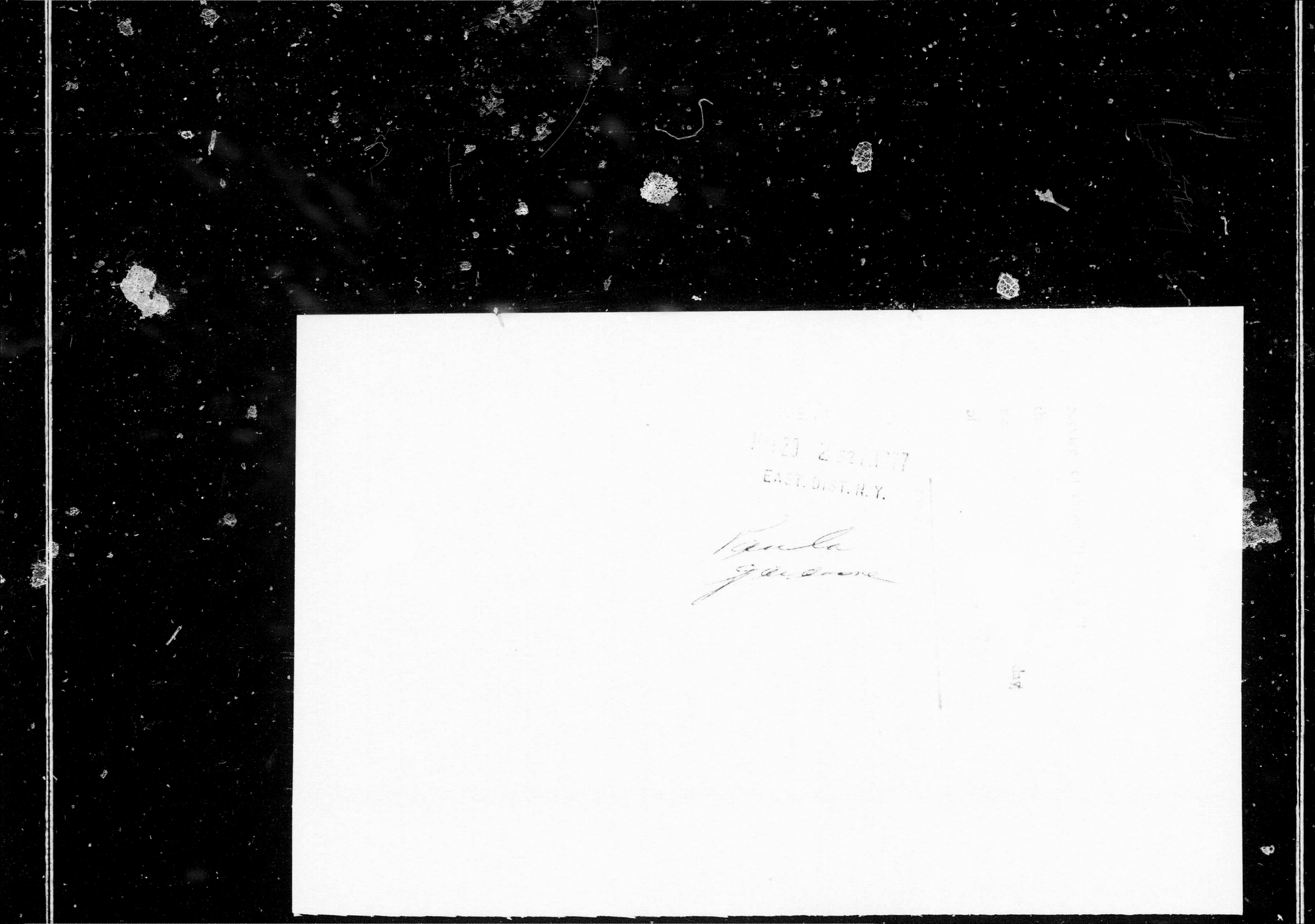
HAROLD DUBLIRER,
Of Counsel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